No. 2619

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Sierra Land and Livestock Company (a corporation)	*Plaintiff in Error.*
vs.	
Desert Power and Mill Company (a corporation),	*Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR

SWEENEY & MOREHOUSE,

Counsel and Attorneys for Plaintiff in Error.

Filed this----------day of----------, 1915.

FRANK D. MONCKTON, Clerk.

By----------Deputy Clerk.

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Brief of Plaintiff in Error, Upon Writ of Error, to the United States District Court of the District of Nevada.

STATEMENT OF THE CASE

The facts so far as may be necessary to present the legal questions involved, may be stated in a few words. The defendant corporation was the owner of a reduction plant, and on the 5th day of February, 1914, was engaged in the business of milling and reducing gold and silver-bearing ores in the immediate vicinity of the town of Millers, in the County of Esmeralda, in the State of Nevada. In conducting its business large quantities of cyanide and its chemical compounds were used, which is a quickly acting and

deadly and virulent poison to animal life, all of which the Defendant well knew. The Defendant therefore, maintained near and at its plant, artificial reservoirs, ponds or pools, for the purpose of impounding and retaining the cyanide and its compounds. The lay of the land sloped from the plant toward the town of Millers, and its travelled road coming into and going out of Millers. These impounding pools, or reservoirs, gave way, and the water therefrom, containing cyanide and its compounds, ran down upon, and over and across, the well-travelled road leading into and out of Millers, and settled in pools and ruts in said road. There had also been heavy rains, which, added to the cyanide pools in the road, gave these pools the appearance of bodies of rain-water, and suitable for the watering of sheep or other stock. The Defendant knew that its impounding reservoirs had broken, and that its cyanide waters had ran down, to and across the travelled road, and stood in pools in said road, mixed with rain water, on the 5th day of February, 1914, and that the road, although not a laid out and dedicated public road, was the main travelled road, and that it was and had been so used for several years. The Defendant also knew that its cyanide waters was a deadly poison, and that stock of any kind travelling along said road, were likely to drink of said waters. The defendant kept no guard, nor did it put up any signs or give any notice, of the dangerous character of said waters.

On the 5th day of February, 1914, the Plaintiff, through its sheep-herder and camp-tender, drove down said road, a herd of about 1600 head of sheep, and they drank of the waters in the pools in said

road, thus impregnated with cyanide, and 1095 head of said sheep were speedily poisoned and died. The lands for miles along the said travelled road on either side, was unfenced. The decision of the Court holds that the Plaintiff was guilty of contributory negligence, and cannot recover, because the camp-tender had been told, not by any agent or employe of the Defendant, that the water in the road **might** contain cyanide. The legal questions are: First, Can the Defendant set up as a defense, contributory negligence? Second, Does the answer in this case raise such an issue under the law applicable to pleadings in Nevada? Third, Do the facts in this case constitute contributory negligence. Fourth, If in a Federal Court, contributory negligence is an affirmative defense, has Defendant established the same by a preponderance of evidence? Fifth, That the Court erred in holding the Plaintiff barred by contributory negligence. This is a summary of the facts and points raised by the assignments of error, which we shall take up, separately, by reference to the testimony and authorities.

I

Under our law in Nevada, Section 6546, Revised Laws, it is provided:

"Every person who shall deposit; leave or keep, on or near a highway or route of public travel, on land or water, any unwholesome substance * * shall be guilty of a misdemeanor."

By this section the deposit of cyanide water upon this road of public travel, was a crime. Can the defense of contributory negligence be set up against an act which is criminal, and which act must of

necessity be the proximate cause of the death of the sheep? For what is a proximate cause? The best definition which we can find, is that stated in

City of Winona vs. Botzet, 169 Fed. 321, where the U. S. Circuit Court of Appeals of the Eighth Circuit says:

"The proximate cause of an injury is the **primary moving** cause, without which it would not have been inflicted, and which is the natural and probable consequence of events, without the intervention of any new and independent cause produces the injury."

And the Court says in that same case, at pp. 328 and 329:

"The **proximate** cause of an injury is the **primary** moving cause **without which** it would not have been inflicted, but which, **in the natural and probable sequence** of events, and without the intervention of any new or independent cause, produces the injury. The **intervening** cause that will insulate the original wrongful act or omission from the injury and **relieve** of liability for it must be an **independent** intervening cause which **intercepts** the **natural sequence** of events, **prevents** the ordinary and probable result of the **original** act or omission, and produces a **different** result, which could not have been reasonably anticipated."

This to our minds is the true rule. First, The **primary** and moving cause, is the cause, **which without** it would not have inflicted any injury. Now **no injury** could have been **inflicted** had there been no cyanide in the water. Second, The natural and probable **sequence** of cyanide in the water, was death

to the sheep. Third, This sequence or result, prudence and forethought could not fail to comprehend, know and understand. Fourth, The independent cause must interrupt the **natural** sequence of the events of the primary cause. Fifth, And the **intervening** cause must produce a **different** result, which could not be foreseen, or anticipated.

Otherwise, the **proximate** cause is the **event,** which ordinary prudence could have foreseen and knew. The Defendant knew that cyanide was poison. That animals, being thirsty, would drink water. That water flowing or being deposited in pools or ditches near or in a travelled way, would be drank by thirsty animals. That if they so drank, death would ensue. It knew that drinking of water by animals, is not a **cause,** but a **result.** Therefore, the drinking of the water by the sheep was not an independant cause, but only a **link** in the chain of causation. And besides, the Plaintiff had a right to **presume** that the Defendant would not violate the law and permit poisoned water to stand in pools or ponds or cross the track of a travelled road, in an open and unfenced tract of land, where persons or animals might drink and be poisoned, without Defendant giving some kind of warning by signs or a guard.

Robinson vs. W. P. R. R. Co., 48 Cal. 409.

Franklin vs. Motor P. Co., 85 Cal. 70.

Solen vs. Virginia City, 13 Nev. 125.

Benten vs. C. P. R. R. Co., 14 Nev. 361.

Again the rule is "If the contributory negligence was of a **negative** character, such as lack of vigilance, and was itself caused by, or would not have

existed, or no injury would have resulted from it, **but for the primary wrong**, it ought not * * * in reason * * * or in law, be charged to the injured one, but rather to the original wrong-doer."

Wabash etc. vs. C. T. Co., 23 Fed. 738.

Now, the primary wrong was cyanide in the water. Had there been no cyanide in the water, no harm would have resulted. Drinking of water by the sheep was not negligence, or wrong. The **cause** of **death** was not the drinking of water by the sheep, but the **poison** in the water.

So again, as Mr. Beach on contributory negligence says, Section 24, Second Edition, "The Courts declare, and it is a settled rule of law, that, not only must the negligence of one injured by anothers culpable neglect contribute to produce the injury, but that, if it is to constitute contributory negligence, it must contribute as a **proximate cause**, and not as a remote cause or mere condition."

It will thus be seen that to make contributory negligence a defense, it must of itself be the proximate cause of the injury or damage.

This is very prettily stated in the notes to

Merrill vs. L. A. Gas etc., 139 Am. St. 134.

Which will be seen, is strictly applicable to this action, for it is said:

"If a person by his negligence produces a **dangerous condition of things**, which does not become **active** for mischief until another person has operated upon it, by the commission of **another negligent** act which

might not unreasonably be anticipated to occur, the original act of negligence is regarded as the proximate cause of the injury which finally results. The principle is, that the first act is regarded as being continuous in its operation up to the time of the second, and therefore, for the purpose of fixing the defendant's liability, the two acts are treated as contemporaneous. **If the original negligence operates with the intervening cause, then it becomes the proximate cause by the continuity of its action."**

It will thus be seen that where the act of negligence of the defendant is a **continuous** act, it is the proximate cause; or, to put it as Judge Henshaw says in

Merrill vs. L. A. Gas etc., 139 Am St. p 138.

"The independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that its damage occassioned was in no way a natural or probable consequence of the original wrongful act or omission."

The poison was in the water. That was an act of the defendant. No notice was posted, no employe stationed to give warning. Any person or animal drinking the water was sure to be poisoned. The Defendant knew that. Up to the drinking of the poisoned water by the sheep, the negligence of the defendant was continuous. The drinking of the water was an innocent act.

And the Supreme Court of the United States says in

Milwaukee etc. vs. St. Paul etc., 4 Otto 469,

"The question always is, was there an unbroken connection between the wrongful act, and the injury, a continuous operation?"

Now the flowing of the cyanide into pools upon the road, must of necessity, have been a continuous danger. Being a continuous danger, that fact must necessarily be the proximate cause, for without it no danger could have taken place. These seem to us to be the rules, then, that where contributory negligence **is not the** proximate cause, it constitutes no defense.

II

Now, another rule also provides, that where the negligence of the defendant is willful, or wanton, contributory negligence is no defense.

Sec. 67 Beach on Contributory Negligence, 2nd Edition.

Where it is said, "When the defendant, by his own negligent or wrongful acts or omissions, constituting a breach of legal duty, throws the plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of safety, induced by the defendant, when there is, in reality, danger, to which the plaintiff is exposing himself, in a way and to an extent which, but for the defendant's inducement, might be imputed to plaintiff as negligence, sufficient to prevent a recovery, such conduct on the part of the plaintiff, so induced, will not constitute contributory negligence in law, and the defendant will not be heard to say that the plaintiff's conduct under such circumstances is negligent for the purposes of the action. The defendant by his own negligent conduct, which has occassioned the

conduct of the plaintiff, is estopped, in a certain sense, from making the defense that the plaintiff's conduct was negligent, or in other words, he is not allowed, first to induce the plaintiff to be careless, and then to plead that carelessness as a defense to an action brought against him for the mischief which has been the result. The defendant must not take advantage of his own wrong in such a way as that."

Apply this rule to the case at bar. Here the cyanide ran down to, over and upon the travelled way. There was nothing to show or indicate in the evidence any act of the defendant that there was any cyanide in this water. Nothing to put plaintiff on his guard. He had the right to presume all was safe. There were no signs. No guard stationed to warn anyone. Any person or animal was, if thirsty, led to believe that the water was pure and wholesome. The defendant knew it was poisonous, and in utter disregard of the results, made no effort to protect the public against its dangerous character. Why should the Plaintiff pause for any moment, so far as the conduct of the Plaintiff was concerned, from watering its sheep in these pools.

In Kentucky etc vs. Gastineux, 83 Ky. 1119, It is said, "Wilful neglect is an intentional failure to perform a manifest duty in which the public has an interest or which is important to the person injured, in either preventing or avoiding the injury."

Can the defendant leave its deadly cyanide in pools, upon a well-travelled road, and not be held to wilful neglect? Can it taken advantage of its own wrong, and plead contributory negligence, to an act,

which it knew, was dangerous to life of man or animals, and do nothing,—make no sign, give no warning?

Now, in Birmingham etc. vs. Bowers, 110 Ala. 328,

It is said, "In wanton negligence, the party doing the act or failing to act, is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury."

Here the Defendant knew that cyanide was a deadly poison, and was fully conscious that its act was likely to produce injury.

If the Court will refer to paragrophs VI and VII of the complaint, on pages 2 and 3 of the transcript, the Court will find these facts and full knowledge clearly averred, and by reference to the answer, by the first paragraph thereof, on page 11 of the transcript, the Court will see that paragraphs VI and VII, of the complaint, are specially admitted. How then, can it, admitting its wilful negligence, set up contributory negligence as a defense?

See Sec. 64, Beach on Cont. Neg. 2nd Ed.

II

But it is claimed that the witness Acree, transcript p. 237, swore that the camp-tender, McGarry, who was the employee of the plaintiff, in a conversation with him, asked, "What is the water down there, cyanide or rain-water?" to which he replied, "Well,

I think it is rain-water; it has rained in there, but I wouldn't take a chance upon it if I were you."

Also, Trans. p 307,

Ficks, a witness for Defendant, said, referring to McGarry, "Well, he asked me about the water, and also asked me about cyanide; well, now the water we saw, I told him I didn't think there was, but I wasn't positive whether there was cyanide in it or not. I say, 'There might be.' "

And Bohannan, a witness for Defendant, pp. 281 and 282, says, "Acree laughed, and says, 'Why, I wouldn't take any chances on it being cyanide water; possibly could be.' 'No,' I says to him myself, 'I would not take any chances, either.' "

And Floathe said, Trans p. 297, a witness for Defendant, "I asked him if that was his sheep, and he said 'yes,' then I told him that to be sure and keep them on that side of the track, on the south side of the track, and not get them on the north side, because if he did they would be liable to get into cyanide—get into water there, and I told him if they do you are liable to lose them all."

But, p. 299 Trans. it will be seen that this witness was not referring to this water in the road, but to his own slime pond, which was 300 or 400 yards away.

See page 300.

This is all the testimony upon which the defendant relies for contributory negligence, and upon which the Court based its opinion. But not one of these witnesses was an agent or employee of the Defendant, or had any authority to speak for it.

Now hear McCarry, page 104, Trans: "I asked him," speaking to Acree, "if that was cyanide water down there, and he says, 'No, that is rain-water,' he says, 'The cyanide water is all further over; it is all impounded.'" Also, page 136,

"Well, I went on down town, around there all afternoon, and I didn't inquire any more about the water; I didn't think it was necessary. I found out Mr. Acree told me that it was rain-water down there; I pointed out to him and I asked him 'Is that cyanide water?' and he says, 'No, that is rain-water; the cyanide water is impounded; it is further over.'"

Again, page 145,

"The pump man said he told this man (the herder) it was rain-water, and he thought it was rain-water."

Again, page 146,

"I called Pete up (the herder) and asked Pete if this pump man didn't tell him it was rain-water, and he said 'Yes.' And the pump man says, 'I did tell him it was rain-water, and I thought it was rain-water.'"

See pp. 156-157-158.

And on pages 159 and 160, McGarry says, "No, sir, he never did; if I had had half of the warning I was supposed to have got I would not have been anywheres near Millers. Do you suppose if half of these men had told me, that I would have to keep away from there; do you suppose if every man in town had come up and told me that, I would go down there with the sheep? I would have been an awful

fool if I did, to have every man come up and tell me it was cyanide water, and then go right down there to it."

Page 162,

"But I certainly had no idea in the world that it was cyanide water right in the road"

Peter Lamont, Plaintiff's witness, says, page 177:

"He say, 'Yes,' he asked him if he could give drink to the sheep? He told him it was raining water on the road." He say it was—that he thought it was rain-water in the road."

Page 186,

"Q. If these had been your own sheep, would you have watered them there?

"A. He say, yes, sure."

This covers the main testimony of the Plaintiff. From these extracts of the testimony it will be seen that **no person, no witness,** ever said there was cyanide in the water or gave any reason, or stated any fact, that would lead any person to believe that there was cyanide in the water. This was rain-water, apparently standing in pools in the road. Not a single witness knew there was cyanide in it. Acree thought there might be, not that there was.

III

In the Federal Courts, contributory negligence is a matter of defense, of which the **burden** of proof is upon the **defendant,** and consequently, reasonable presumptions in respect to matters not proven, or left in doubt, should be in favor of the injured party.

Wabash, Etc. vs. C. T. Co., 23 Fed. 738.

R. R. Co. vs. Geadman, 15 Wall. 401.

R. R. Co. vs. Narh, 93 U. S. 291.

Hough vs. Railway Co., 100 U. S. 213.

Geotzman vs. Portland, Etc., 54 Ore. 114.

Moulton vs. Aldrich, 28 Kans. 314.

Holmes vs. Ore. R. R. Co., 5 Fed. 523.

Town of Watertown vs. Green, 112 Fed. 183.

And the plaintiff had the right to **presume**, that the defendant would not permit poisoned water to stand in pools in the travelled road.

Franklin vs. Motor, Etc., 85 Calif. 70.

Franklin vs. Motor, Etc., 85 Calif. 70.

Salem vs. Vir. City, 13 Nev. 125.

Benton vs. C. P. R. Co., 14 Nev. 361.

Now then the burden of proof being on the defendant, it must establish the contributory negligence, by a preponderance of evidence.

Now then, the witnesses for the defendant, did not say, nor did they pretend to know, that there was cyanide in the water standing in the traveled road. They only said there "might be." They simply guessed. They gave no reason for their statements. They stated no fact. There was no statement that the impoundment had broken—or that the cyanide had escaped. They said nothing more than a mere guess, and as plaintiff had the right to **presume**, that the defendant had not permitted its cyanide to escape, he had the right to rely upon that presumption. Further, plaintiff's witnesses were

told it was "**rain water.** Rain water does not carry cyanide. All of defendant's witnesses testified it was rain-water, and on page 287, Transcript, Bohannan, witness for defendant says:

"Q. And it was generally thought around that neighborhood, that this was rain water that had come in there with the recent rains, and wasn't poisonous at all?

A. I think that was the opinion."

If that was the **opinion** of persons living there, why should plaintiff be held accountable for entertaining the same opinion, when McCarry and Lamont, its witnesses deny that any one told them or either of them, that it "might" contain cyanide? Would any sane man drive 1600 head of sheep up to drink cyanide water, when he knew or had reason to believe the water contained cyanide? Where then is the **weight** or preponderance of evidence? Certainly with the plaintiff. There was nothing to indicate cyanide or the escape of cyanide into the water. There was no notice, no guard by the defendant. There was nothing to warn plaintiff. Therefore, when plaintiff's witnesses testify that no one said other than it was rain water—and the acts of McCarry and Lamont are in harmony with a want of knowledge, and as "acts speak louder than words," there is no other conclusion that can be reasonably drawn, but that they had no other idea, but the water was rain water, for had they the slightest idea the water contained cyanide, they would never have driven the sheep to it to drink. Thereupon the weight of evidence, shows that the witnesses for the defendant, none of whom were employees of the

defendant, none of whom knew or pretended to know that there was cyanide in the water, are simply mistaken about the statement "might be," and the defendant utterly fails to show a preponderance of evidence.

Further plaintiff's witnesses had a **duty** to perform—were under a **responsibility** for the care and protection of the sheep—and therefore, would be **careful** and **considerate** of their acts and conduct, and **would not mistake** or **misunderstand,** what was said to them. But defendant's witnesses had no duty, no responsibility, no purpose of motive to remember what was said.

And this Court says, through Judge Hawley:

In Dauntless, 129 Fed. 715

"Self preservation is the first law of nature. We have the right therefore to look to the common experience of mankind, in order to determine whether the statement of McNeil is reasonable or not."

So here the preservation of the life of the sheep, must necessarily, become a factor in weighing this evidence, and we have the right to weigh the common expenience of mankind. Is the common acts and conduct of men to drive their sheep to drink water, which they knew, or believed or had been told, contained cyanide.

But further Judge Hawley says, quoting Judge Wallace in 8 Fed. 729, "The natural instinct of self preservation in the case of a sober and prudent man stands in the place of positive evidence." If so the same rule must prevail as to the preservation of

property—particularly sheep from cyanide water.

So in Blankman vs Vallejo, 15 Calif. 638, "The inherent improbability of a statement may deny to it all claims of relief." Can any one believe that if Acree, or Bohannan, or Floathe, had told McGarry, that there was cyanide in this water, or that there might be, he would have deliberately watered his sheep with such water? It is not within the range of belief or confidence. Therefore we affirm that defendant did not establish contributory negligence upon the part of the plaintiff, by a preponderance of evidence or any evidence.

IV.

But further, before contributory negligence can be established, it must be shown that plaintiff had knowledge of the danger to his sheep.

Sec. 36, Beach on Cont. Neg., 2nd Ed.

What knowledge did it have? None. Who said there was cyanide in this water? No one. Who said the reservoir had broken, and that cyanide water had escaped? No one. What notice had plaintiff's servants? None. Those two witnessess said there might be cyanide. Granted. But they were outsiders, and not servants of the defendant. Was such statement notice?

In Bushman vs. Kelly, 38 Minn. 197, it is said in speaking of notice of defect in title to real property:

"It is essential quality of notice, that it appear to be given by compentent authority, and a notice by a mere stranger can express nothing."

But a mere statement that there **might** be cyanide, certainly cannot be notice. There is no **fact** stated of any kind. Nothing carrying or giving any knowledge, or directing attention to any fact, which would lead to knowledge and overthrow the presumption upon which plaintiff had the right to rely, that defendant had not, and would not let a deadly poison rest in pools in the travelled road without warning. To be notice, either actual or constructive, there must be the statement of some **fact,** which would lead to the apprehension of danger. "Now, plaintiff's witnesses, by word and act, show that nothing was said that there might be cyanide. Plaintiff's testimony show that no such statement could have been made. The act of watering the sheep speaks in no uncertain tones, that no such statement was made. There was no sign or warning or anything to induce plaintiff's witnesses to think or anticipate danger. The act of defendant was the grossest negligence, against which the defendant had the right to presume had not been done or committed. It seems to us, that upon principles of law and justice, this Court cannot and will not find contributory negligence.

V

But the Hon. District Court, quotes:

White vs. People R'W., 72 Atl. 1059.

But overlooks that that case is not in point, because it says, "Where he **knows** of the existence of danger, or **ought** to know of it, and with **such knowledge** voluntarily runs into the danger, etc."

Where and when did plaintiff **know**?.. From what

fact ought it to know? With what **knowledge** did it have?

Plaintiff did not **know**, and had no **knowledge.** This is not the case of crossing a railroad track, because a railway track is itself a sign of danger. Here there was no sign or anything to attract attention.

The learned Court also cites

Beinhorn vs Griswold, 69 Pac. 557.

But that case is not in point, because in that case, there was no inducement, invitation, allurement or attraction. The plaintiff's stock in that case were where they had no right to be. But in this case, here was a well travelled road, and the Hon. District Court says (Trans. p. 327) "The road has been used by the public generally, for a number of years" and on (p. 34 Transcript) the Court says, "It was the duty of defendant to take every reasonable precaution to prevent injury to those who were passing over the road." This duty in my opinion defendant failed to perform. Under all the circumstances in evidence, it is futile for defendant to plead ignorance of the fact that the road was in common use, or to urge that any one using it as a thoroughfare was in any sense a tresspassor." It will be seen that the Court finds the **duty** of the defendant, and that plaintiff was **not a tresspassor.** How then, can Beinhorn vs. Griswold **supra** be applicable, when the Court in that case makes it clear that in that case, the defendant owed **no duty** to the plaintiff and that plaintiff was a tresspassor, and particularly distinguishes that case, from one like this. Now it will be seen that Hon. District Court, applies a rule of law not

applicable to the case at bar, and overlooks the true rule to be applied to contributory negligence, and fails to distinguish between wilfull and wanton and reckless negligence of defendant, or gross negligence, and mere negligence, and that defendant's negligence was continuous, and that contributory negligence cannot be used to excuse defendant for its wanton and reckless disregard of its plain duty, to the plaintiff and the public, and that the proximate cause is the continuous act of the defendant. Therefore we submit, the judgment should be reversed and judgment entered for plaintiff to the amount of its proven damages, towit: that is 1095 head (p. 199) at $6.00 per head (p. 202) or $6570.00 We have not taken each assignment of error separately, because all assignments cover practically the same questions.

Respectfully submitted,

Sweeney & Moorhouse.

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